Supreme Court, U. S.
FILED
OCT 7 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941

No. 686.

B. KATHRYN WILLIS, as Executrix of the last will and testament of GEORGE S. WILLIS, deceased,

Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

THOMAS J. O'NEILL,
Attorney for Petitioner,
369 Lexington Avenue,
New York City, N. Y.

SUBJECT INDEX

PAGE

PETITION 1

Summary Statement of the Matter Involved..... 1

Jurisdiction 2

Opinions of the Courts Below 3

The Questions Presented 3

Reasons for Allowance of Writ 3

Prayer for Writ 5

BRIEF IN SUPPORT OF PETITION 7

Opinions of the Courts Below 7

Jurisdiction 7

Statement of Case 7

Specifications of Errors 13

ARGUMENT .....

I. The Trial Court erred in setting aside plaintiff's verdict and granting defendant's motion for a directed verdict, and ordering that judgment be entered for defendant 14

A. Plaintiff's testator's death was caused by the gross negligence of the defendant in causing and permitting a dangerous and unsafe practice to exist in its yards 21

B. The defense of assumption of risk is not available to the defendant in this case under the amendment to the Federal Employers' Liability Act, which provides that an employee shall not be held to assume any risk arising in whole or in part from the negligence of his employer 22

PAGE

C. Upon all the evidence in this case the Trial Court could not have properly directed a verdict for defendant 23

D. Upon all the evidence in the case, this verdict could not be properly held to have been against the weight of the credible evidence 25

II. The Trial Court erred in granting, in the alternative, a new trial on the ground, as stated, that plaintiff's verdict was contrary to the evidence 25

CONCLUSION 28

APPENDIX 29

TABLE OF CASES CITED

Banchetti v. Gorsline & Swan Construction Co., 152 App. Div. 275 21

Block v. Mansfeld Mining & Smelting Co., 23 F. Supp. 700 28

Commercial Union of America, Inc. v. Anglo-South American Bank, 1 F. (2d) 937 28

Delk v. St. Louis & S. F. R. Co., 220 U. S. 580.....5, 24

Doing v. N. Y. O. & W. R. Co., 151 N. Y. 579 21

Dowd v. N. Y. O. & W. Ry. Co., 170 N. Y. 459 21

Dzkowski v. Reynoldsville Carting Co., 216 N. Y. 173 21

Equitable Life Assurance Society of the United States v. First National Bank of Union Springs, 40 F. (2d) 817 (C. C. A. 5) 5, 24

Farmers' Loan & Trust Co. v. Miller, 298 Fed. 758 ... 28

Gagnon v. Klauder-Weldon Dyeing Machine Co., 174 Fed. 477 21

Galley v. Smith, 272 Fed. 999 21

PAGE

Hadden v. Natchaug Silk Co., 84 Fed. 80 28
In re Hines, 88 F. (2d) 423 28

Knickerbocker v. General Ry. Signal Co., 209 N. Y. 404 21

Mahoney v. Cayuga Lake Cement Co., 208 N. Y. 164.. 21
Marshall's U. S. Auto Supply, Inc. v. Cashman, 111 Fed. (2d) 140, certiorari denied, Supreme Court, 85 L. Ed. 66 26
McClintic-Marshall Const. Co. v. Forgy, 246 Fed. 193 21
McCoy v. N. Y. C. & H. R. R. R. Co., 185 N. Y. 276.. 21
Minneapolis, St. P. & S. S. M. Ry. Co. v. Galvin, 54 Fed. (2d) 202 (C. C. A. 6) 5, 24

Nonce v. Richmond & D. R. Co., 33 Fed. 429 25
Nowak v. Delaney Forge & Iron Co., 159 App. Div. 155 21

Payne v. Haubert, 227 Fed. 646 (C. C. A. 6) 5, 24
Pettingill v. Fuller, 107 Fed. (2d) 933, certiorari denied, 309 U. S. 669 27
Potlatch Lumber Co. v. Anderson, 199 Fed. 742 21
Pringle v. Guild, 119 Fed. 962 25

Rosenzweig v. Hines, 285 Fed. 622 25
Ryan v. D. & H. Co., 114 A. D. 268 (affd. 188 N. Y. 559) 21

Self v. New York Life Ins. Co., 56 F. (2d) 364 (C. C. A. 8), certiorari denied, 287 U. S. 607....5, 24

The P. P. Miller, 180 Fed. 288 21

United States Fidelity & Guaranty Co. v. Wilson, 52 F. (2d) 66 (C. C. A. 8) 5, 24

Wakelee v. Davis, 44 Fed. 532 28
Weed v. Lyons Petroleum Co., 294 Fed. 725 25
White v. Bingham, 25 F. (2d) 837 (C. C. A. 1).....5, 24
Wilcox v. N. Y. N. H. & H. R. Co., 81 Fed. 143 25

Judicial Code, Section 240 (a); 28 U. S. C. A., Sec. 347 (a) 2

Federal Employers' Liability Act, U. S. C. A., Title 45, Secs. 51 et seq. 1

Federal Employers' Liability Act, Sec. 4, U. S. C. A., Title 45, Sec. 54 .....3, 4, 22, 29

Supreme Court of the United States

OCTOBER TERM, 1941

No. .

B. KATHRYN WILLIS, as Executrix of the last will and testament of GEORGE S. WILLIS, deceased,

Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

The petitioner prays that a writ of certiorari issue to review the order of the United States Circuit Court of Appeals for the Second Circuit, affirming a judgment of the United States District Court for the Eastern District of New York in favor of the defendant, entered upon an order setting aside a verdict in the sum of $36,000.00 in favor of the plaintiff, and directing a verdict for the defendant on the merits, and ordering that judgment be entered for the defendant, and ordering, in the alternative, that a new trial of the issues in this action is granted on the stated ground that the verdict as rendered was contrary to the evidence.

Summary Statement of the Matter Involved

Action was brought under the Federal Employers' Liability Act, 45 U. S. C. A., Secs. 51 et seq., to recover damages for the death of plaintiff's testator, alleged to have been caused by the negligence of defendant, his employer.

Petitioner contends that decedent's death was caused by the gross negligence of defendant in causing and permitting

its work to be done in an unnecessarily unsafe and dangerous manner, and in accordance with an unsafe and dangerous practice, in that it caused switching operations to be continued, and cars to be switched without warning to and past the point where decedent and two other employees were repairing a switch in defendant's railroad yard, when such danger could have been obviated by merely taking out of use for a short period of time four tracks of the thirty-four tracks in defendant's yard.

Upon the first trial before Judge Galston and a jury, at the close of plaintiff's case, defendant moved for the direction of a verdict in its favor, and said motion was denied. Defendant, without presenting any evidence, thereupon rested its case and renewed the motion. The Court reserved decision on the motion, submitted the case to the jury, and the jury disagreed. Order denying defendant's motion for a directed verdict, and granting a new trial was made and entered on July 5, 1940 (R., pp. 262-263; see memorandum opinion of Galston, D. J., R., pp. 261-262).

The retrial, resulting in a verdict in favor of the plaintiff in the sum of $36,000.00, was had before Judge Byers and a jury. The plaintiff's evidence was the same at both trials, with the exception that at the second trial it was stipulated that the plaintiff's testimony was to the effect that when Willis left the house that morning there was no sign of his being ill or sick or anything of that kind (R., pp. 181, 250)—which Judge Byers characterized as an inconsequential exception (R., p. 237).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925; 28 U. S. C. A., Sec. 347 (a).

The date of the judgment or decree of the United States Circuit Court of Appeals for the Second Circuit is August 26, 1941 (R., p. 282).

It is submitted that the facts and the law hereinafter set forth in the reasons for the allowance of the writ and in the brief, and the cases therein cited, and which in the interest of brevity are not repeated here, bring the petition herein within the provisions of Rule 38, Paragraph 5, Subdivision (b) of the Rules of this Court.

Opinions of the Courts Below

The opinion of Judge Galston, upon the first trial, is not reported, but appears at pages 261-262 of the record.

The opinion of Judge Byers, upon the second trial, is reported in 35 Fed. Supp. 941 (R., pp. 237-257).

The opinion of the Circuit Court of Appeals for the Second Circuit, Judge Frank, dissenting, dated August 5, 1941, has not yet been reported, but appears at pages 273-281 of the Record.

The Questions Presented

The case presents the following questions:

1. Whether or not the Trial Court and the Circuit Court of Appeals for the Second Circuit erred in holding that plaintiff's testator's death did not result from an inherently dangerous method of doing the work.

This question involves the construction of Section 4, as amended, of the Federal Employers' Liability Act, effective August 11, 1939, fourteen days prior to the death of plaintiff's testator.

2. Whether or not the Trial Court and the Circuit Court of Appeals for the Second Circuit erred in holding that plaintiff's testator's death resulted solely from his own negligence.

Reasons for Allowance of Writ

1. It is submitted that this case presents an important question of federal law which has not been, but should be, settled by this Court.

Section 4, as amended, of the Federal Employers' Liability Act provides that an employee "shall not be held to have assumed the risks of his employment in any case where such injury or death resulted *in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier;" (Italics ours).

This constitutes a complete change in the law with reference to assumption of risk, and the petitioner contends that, irrespective of the length of time the alleged custom prevailed in the yard, and irrespective of whether or not Willis was the watchman, the plaintiff is entitled to judgment under this section, as amended.

Prior to the amendment, the plaintiff could not succeed in any action under the Federal Employers' Liability Act in which a negligent and dangerous custom and practice was proved, not because the defendant did not violate its duty to its employees in failing to have the work done by a reasonably safe method, but because, while the plaintiff would be establishing the defendant's causal negligence, he would also be proving the defense of assumption of risk as it then existed.

The question is not only an interesting one but a new one never before decided by this or any other Court, insofar as we have been able to determine, in an action under the Federal Employers' Liability Act, except by the Courts below in the instant case.

The question of law is one of great general importance to injured and the dependents of killed railroad employees and one that will arise time and time again.

If it is ruled upon at this time the Courts will be relieved of their uncertainty and will be able to dispose of the problem regardless of the particular fact situation presented.

The decisions heretofore holding, in cases of this kind, that the plaintiff could not recover were all based on a finding of assumption of risk, and no longer apply.

With the doctrine of assumption of risk abolished, employers should not be permitted to expose their employees

to all sorts of unnecessary risks and dangers and still escape responsibility for their acts. The law certainly should not countenance such social abuses.

2. It is submitted that the decision of the Trial Court and the Circuit Court of Appeals in holding that Willis was the watchman and that, therefore, his own negligence was the sole cause of his death, and in setting aside the verdict in his favor and directing a verdict for the defendant, was in conflict with the applicable decisions of this Court and other Circuit Courts of Appeals on the same matter (*Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580; *Equitable Life Assurance Society of the U. S.* v. *First National Bank of Union Springs*, 40 F. (2d) 817 (C. C. A. 5); *U. S. Fidelity & Guaranty Co.* v. *Wilson*, 52 F. (2d) 66 (C. C. A. 8); *Self* v. *N. Y. Life Ins. Co.*, 56 F. (2d) 364 (C. C. A. 8), certiorari denied, 287 U. S. 607; *White* v. *Bingham*, 25 F. (2d) 837 (C. C. A. 1); *Payne* v. *Haubert*, 277 F. 646 (C. C. A. 6); *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Galvin*, 54 F. (2d) 202 (C. C. A. 6).

3. It is submitted that the Circuit Court of Appeals, in affirming the action of the Trial Court in arbitrarily ordering, in the alternative, a new trial, has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, your petitioner respectfully prays that this petition for a writ of certiorari to review the order of the Circuit Court of Appeals for the Second Circuit be granted.

THOMAS J. O'NEILL,
Attorney for Petitioner,
369 Lexington Avenue,
New York City, N. Y.

Supreme Court of the United States

OCTOBER TERM, 1941

No. .

B. KATHRYN WILLIS, as Executrix of the last will and testament of GEORGE S. WILLIS, deceased,

Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION

Opinions of the Courts Below

The opinions of the Courts below are set forth in the petition.

Jurisdiction

A concise statement of the grounds on which the jurisdiction of this Court is invoked is set forth in the petition.

Statement of Case

The deceased, a signal maintainer employed by the defendant, met his death on August 25, 1939, a clear day (R., p. 80), at about 8:45 A. M. (R., p. 53), when struck by a moving car being switched, without warning, past the point

where he and two other employees were engaged in repairing a switch in the defendant's westbound Enola Yard, Enola, Pa.

The testimony of the witnesses at the scene of the accident, all employees of the defendant, was taken by deposition at Harrisburg, Pa., and read to the jury upon the trial.

This westbound Enola Yard, in railroad parlance, runs east and west, and the hump office is to the east. The distance from the apex of the hump to switch 14, the third switch west of the apex, is 507 feet; from the apex to switch B, the second switch west of the apex, the distance is 267 feet; and from the apex to switch A, the first switch west of the apex, the distance is 152 feet. The west end of the hump office is 95 feet west of the apex, or 412 feet east of switch 14 (R., pp. 33-34; Plaintiff's Exhibit 2, offered R., p. 29, printed R., p. 225).

In front of the hump office is a single track called the ladder track, and proceeding to the west the switches lead to the 34 tracks of the westbound yard (R., p. 55).

All of the switches in that yard are operated by power by tower switchmen stationed in the hump office. These men are equipped with a switching list which shows on what track, or tracks, the cars are to go (R., pp. 35-36). The train is pushed from the east up to the apex of the hump, and the grade goes down in front of the hump office in a westerly direction (R., p. 36). At the apex the car cutter walks alongside of the cut, uncouples the most westerly car, or cars, and the cars roll down the grade with a brakeman on top (R., pp. 64-65). The train is pushed up to the hump at about the speed of a man walking, and after they are uncoupled the cars travel down the hump at a speed of 10 or 15 miles an hour (R., pp. 65-66).

Before commencing this work, Donofrio, a trackman, went up to the hump office and spoke to Assistant Yardmaster Craig (R., p. 56) in the presence of the two tower switchmen (R., p. 57), told him he wanted switch 14, and

asked what track he could spare (R., p. 58). Craig told the switchman to give Donofrio track 14 and use the rest (R., p. 56). (A car passing over switch 14 going in a westerly direction can go into any one of four tracks, 14, 15, 16 or 17. If the switch is thrown in a straight or normal position cars can go into tracks 15, 16 and 17, but not into track 14; if thrown in reverse position cars can go into track 14, but not into tracks 15, 16 and 17 (R., pp. 103-104).)

Vogelsong, one of the switchmen, told Donofrio to block the switch in straight or normal position, and Vogelsong then told Haas, the other switchman, to cap switch 14 on the switchboard so that it could not be moved (R., p. 37).

Donofrio then went back to Willis and Myers, told them they had the track, to go ahead and work (R., p. 63), and that they had about a half hour to do the job (R., p. 114). They spiked or blocked the switch (R., p. 107). Spiking or blocking the switch prevents the switch from being thrown while men are working on it (R., p. 50). The switch had then been blocked in straight position—in the tower, by placing a cap over the button controlling switch 14, and down at switch 14 by putting a block and spike in it (R., p. 62). Spiking the switch did not prevent the cars coming down to and past the point where the men were working at switch 14 (R., p. 110) into tracks 15, 16 and 17 (R., p. 41), but prevented cars from going in on track 14 (R., pp. 154-155). After Donofrio returned from the hump office, the men had been working about 10 or 15 minutes before the accident occurred (R., p. 68) that resulted in the death of Willis and very serious injury to Donofrio. The car that struck the men was the first car that came down to switch 14 after Donofrio had come back from the hump office (R., p. 110).

When they started that work Willis was standing in the six-foot (inter-track space) between track 14 and the jitney track, the track north of switch 14 (R., p. 71), about four feet away (R., p. 76).

When last seen, about four or five minutes before the accident, Willis had turned the air off the switch and was standing between the rails about five or six feet west of the other two men (R., pp. 109-112).

Donofrio did not see the car until about two feet before it hit him (R., p. 75). Myers, a helper, first saw the car when it was five or ten feet away. At the time Willis was hit he was standing between the rails (R., p. 110). Three or four seconds later, a car, following at a distance of about 150 feet, also went over Willis (R., p. 112).

The witnesses all agreed that no warning was given of the approach of the car (R., pp. 78, 114, 159).

The car ahead of VanCamp's car, the first car that struck the men, was about 3 carlengths in front, was destined for track 21, and went off at switch A. Between that car and VanCamp's car, and in that space of 3 carlengths, switch A had to be thrown from normal to reverse position so that VanCamp's car could go down to switch 14, and was so thrown (R., p. 147).

The men working on the switch knew nothing about the destination of the cars. The only way they could tell if a car was going off at switch A or switch B, or coming straight down to switch 14, was by the color of the switch light (R., p. 84)—yellow for off the ladder, and white for straight down the ladder. The light at switch B would be white for a car going down to switch 14 (R., p. 159). The cars roll off the hump one right after the other (R., p. 84) with a few seconds between each car (R., p. 106), and the switch changes between the cars (R., p. 84), sometimes right in front of the car (R., p. 85). Even if a switch was set for a track, until a few seconds before a car reached the switch the men could not tell that the car was going that way, because it might be changed (R., p. 107). A switch can be changed suddenly, immediately before a car gets to it (R., p. 144).

The men could not tell that a car was coming down to switch 14 until B switch (only 240 feet away) was thrown (R., p. 157).

The switches were low, about 14 or 16 inches above the ground, and, at times, the car ahead would block the view of the switch (R., p. 158).

Donofrio testified that the repair work at switch 14 could have been done in 20 minutes or a half hour with no cars coming down (R., p. 61). The switching movement could have been stopped entirely by turning a single light at the east end of the yard office, facing the engine (R., p. 43), but this was not done. The car cutters could have been notified by the speaker system to stop cutting the cars, but this was not done (R., p. 44).

Also the work could have been done safely, without stopping *all* of the switching for *any* length of time by merely having the safe system of setting switch B in reverse position, thus keeping only four tracks out of the switching movement for only twenty minutes or a half hour.

When switch A is set in a straight position, cars go off at switch A to the north side of the yard and do not go down to switch B. When switch A is set in reverse position, cars go down to switch B and, then, according to the setting of switch B, either down to switch 14 or off at switch B to the south end of the yard (R., p. 104).

When switch B is set in reverse position, the cars go off on another route and do not go down to switch 14. When switch B is set in straight position, cars go down to switch 14 and, then, may go on tracks 15, 16 or 17, if switch 14 is straight, or on track 14, if switch 14 is set in reverse (R., p. 104). By setting switch A in a straight position or switch B in reverse position, no cars could go down to switch 14 where the men were working (R., p. 105).

All the switches could be blocked in the hump or switch office (R., p. 108).

By blocking or setting switch B in reverse position, four tracks only would have been kept out of the switching movement (R., p. 116).

There were 60 or 80 cars on the train (R., p. 44). The cars for track 14 were dropped off on track 20, a rehandling track, which is rehandled every eight hours (R., p. 46). The cars destined for tracks 15, 16 and 17—and there were only 8 or 10 of those (R., p. 47)—could have been placed on track 20 until the men had finished their work (R., p. 46). That would mean merely reclassifying 8 or 10 cars later out of that whole cut of 60 or 80 cars (R., p. 48).

In the eastbound yard, consisting of 43 tracks, in which about the same amount of work was done as in the westbound yard (R., p. 121), there were no riders because the eastbound yard was equipped with *car retarders.* The car retarders, installed on the tracks about 100 feet apart, slow up or retard the cars as they go down over the hump, and can stop a car completely within 8 or 10 feet (R., p. 128). They are operated by the switchmen in the towers (R., p. 129).

Donofrio and Myers testified that previous to the accident, when they were tightening rail braces and before Donofrio went up to the switch office, cars came down to and past switch 14 (R., pp. 90, 100, 109), and that Willis was doing the watching (R., pp. 90, 135).

There is employee testimony by Donofrio and Myers that before they started to work Willis had said that he did not feel "so hot", and that they had told him to do the watching and they would do the work (R., pp. 90, 135).

However, when Willis left his home that morning there was no sign of his being ill (R., p. 181), and Myers had testified on direct-examination that at the time of the accident no one was appointed to watch (R., p. 114), and, at one point in his cross-examination, that the three men had no talk about how the work would be done with respect to watching (R., pp. 134-135).

It was also claimed that after Donofrio came back from the hump, he and Myers were working and Willis was watching (R., pp. 63, 134). This was in accordance with a

claimed custom that two men did the work and one man watched (R., p. 137).

Two days before the accident, the same three men worked on other switches in the same yard (R., pp. 74, 136). On that occasion, Willis was working right with the other two men while they were working on the switches, and was not doing any watching then (R., pp. 80, 82). It was claimed that *Myers* was doing the watching (R., p. 81).

That was their general work, and on all of those occasions Willis worked right with them on the switches (R., pp. 82-83).

It was claimed that it was customary to do the work in that way—that is, the men would work and the cars would continue to come down to and past the point where the men were working (R., pp. 116, 137).

Myers, however, had testified on direct-examination that it was customary to block the switch ahead "when you have any work to do on your switch", that they had work to do on switch 14 at the time of the accident, and that switch B was not blocked (R., pp. 117-118), but, later, *in response to leading questions by defendant's counsel*, testified that the switch ahead was blocked when they were doing work of a kind that put the track in such condition that cars could not run over it (R., pp. 133-134).

Specifications of Errors

1. The Circuit Court of Appeals erred in affirming the judgment of the District Court which set aside plaintiff's verdict and granted defendant's motion for a directed verdict and ordered that judgment be entered for defendant.

2. The Circuit Court of Appeals erred in affirming the judgment of the District Court which granted, in the alternative, a new trial on the ground, as stated, that plaintiff's verdict was contrary to the evidence.

ARGUMENT

POINTS

I

The Trial Court erred in setting aside plaintiff's verdict and granting defendant's motion for a directed verdict, and ordering that judgment be entered for defendant.

We think, of course, that the dissenting opinion of Frank, J., is entirely correct on the question he discusses, namely, whether or not the jury had a right to find that Willis was not the watchman.

Judge Frank holds that that question, under the authorities, was properly one for the jury and the jury was justified in returning a verdict for the plaintiff.

He does not, however, discuss the main reason relied on by the petitioner on this application for a writ of certiorari —that is, that the defendant was guilty of causal negligence in causing and permitting its work to be done in an unnecessarily dangerous manner.

We think, however, that Judge Frank assumes that the plaintiff had successfully established the existence of this dangerous system, and that it constituted causal negligence on the defendant's part.

Until the cars being switched westward from the hump arrived at switch B (the switch immediately to the east of 14), the men working at switch 14 had no way of knowing if the car was coming down past switch 14, or going off in another direction at switch B, and the distance between switch B and switch 14 was only 240 feet (R., p. 157).

With switch B in straight position the cars could go down the ladder track to switch 14, where the men were working, and past that point into tracks 14, 15, 16 and 17

(R., p. 104). If switch B had been blocked in reverse position, either down at the switch or in the hump office, the cars could have gone into any of the tracks from 1 to 13, and could not have gone down to the place at which the men were working (R., p. 104).

The defendant contends that its method of switching the cars had been in use for a number of years prior to the accident.

With regard to this contention, the plaintiff claims that this was an inherently dangerous custom and practice which the defendant allowed to exist, and which it did not forbid by any rule or instruction, but, as a matter of fact, it originated this practice which caused the death of Willis and great injury to Donofrio. All of this great danger could have been obviated by merely blocking the switch ahead, switch B, and this would have resulted in putting only four tracks—14, 15, 16 and 17—of the thirty-four tracks in the yard (R., p. 116), out of use temporarily for about twenty minutes or a half hour (R., p. 61).

The proof is that track 20 was a re-handling track where the cars destined for tracks 14, 15, 16 and 17 could be temporarily placed until this work was done (R., p. 46). The testimony shows that this track was re-handled every eight hours (R., p. 46), and that only 8 or 10 cars destined for these four tracks, out of the whole cut of 60 or 80 cars, would later have to be reclassified (R., pp. 47-48).

The jury was not required to accept the testimony that the manner in which it is claimed the work was done was the customary way of doing the work (R., pp. 116, 137). Myers testified on direct-examination that it was customary to block the switch ahead "when you have any work to do on your switch" (R., pp. 117-118). He later attempted to repudiate this testimony (R., pp. 133-134) but, as in the case of the testimony with regard to watching, which we will later discuss, the jury certainly had a right to determine that he had told the truth on direct-examination.

Upon the first trial, Judge Galston held that it was a question of fact as to whether or not the custom that prevailed in the operation of trains in the defendant's yard was unreasonably, unnecessarily and excessively dangerous and unsafe practice; and he also held that if the defendant was negligent in that respect there was no assumption of risk by the employee of such negligent custom of the employer (R., p. 261).

The Court on the second trial also submitted to the jury as a matter of fact the question as to whether or not the defendant's method of doing the work of switching cars to and past switch 14 while the men were taking out the rod was unnecessarily dangerous, and exposed the plaintiff and the men working with him to unnecessary dangers and hazards, and charged that the jury were at liberty, if they found as above, to find the defendant negligent in that respect (R., p. 208).

The Court upon the second trial also correctly charged that if the defendant caused and permitted the particular part of its work here involved to be conducted by a very dangerous method which exposed Willis to great and totally unnecessary dangers, and the business of the defendant was complicated, the jury would have a right to conclude that under those circumstances it was the duty of the defendant to make, promulgate and enforce proper rules to see that the work was not conducted in a manner which exposed Willis to a great unnecessary danger, and was required to use reasonable care to see that such rules forbidding such unnecessarily dangerous practice were enforced (R., p. 209).

The Court further charged the plaintiff's sixth request, the substance of which was to the effect that if they found as above, then their finding would necessarily be that his death resulted in whole or in part from the negligence of the defendant railroad carrier, and that under Section 4 of the Employers' Liability Act, as amended, the jury could not find that Willis assumed the risk of such dangerous method (R., p. 211).

The charge of the Court, as above set forth, we respectfully contend, was entirely correct and exactly in accordance with the authoritative decisions upon these questions.

What, then, have we?

The defendant admits that it did the work in the manner described. The jury had the right to find that it was a practice that was unnecessarily and unreasonably and excessively dangerous and unsafe, and that this caused the death of Willis, and that Willis, under the law, as amended, could not be held by the jury to have assumed the risk of the defendant's negligence in causing and permitting the work to be done by such unnecessarily unsafe method, and in failing to make and enforce a rule prohibiting the doing of the work by such unsafe method.

What question then is left? The defendant's only remaining contention is that, by alleged agreement among the employees, Willis had been appointed to do the watching.

In connection with this claim, the plaintiff contends that the jury could very well have found, upon the probabilities and circumstantial evidence in the case, and apparently did find, that Willis was not the watchman at the time of this accident; and the real probability is that no one had been appointed a watchman.

Let us consider the self-contradicted testimony of the defendant's employees, the only witnesses to the accident, and at the same time bear in mind that the testimony of these interested witnesses was taken by deposition, and that they were not produced in court by the defendant, and the fact remains that the defendant could have produced them. It is likewise true that the fact that the plaintiff did not sue in Pennsylvania is no complete answer to our contention in that regard.

On direct-examination Myers testified that at the time of the accident no one had been appointed to watch (R., p. 114). He repeated on cross-examination that the men did not talk about how the watching would be done (R., pp. 134-135).

Donofrio testified on direct-examination that, when they were working on switches two days before, Willis was not doing any watching, but working on the switches with the two other men (R., pp. 80-82). He also said that on that occasion Myers was doing the watching (R., p. 81).

Although these men later on, under the leading questions of the defendant's attorney, testified that they had an arrangement with Willis to do the watching (R., pp. 90, 135), there was certainly a question of fact for the jury as to whether or not they were telling the truth, particularly in view of their interest.

Apparently, from the testimony and the probabilities of the case, and the circumstantial evidence, Willis was not a watchman upon any occasion, but a signal maintainer who was paid a substantial salary of about $2600 a year to do that work (R., p. 171; Plaintiff's Exhibit 1, offered R., p. 29, printed R., p. 224).

The defendant railroad company probably does not pay a man $2600 a year for work that would consist mostly of watching. Willis, the signal maintainer, undoubtedly knew more about the actual work being done than either Myers, the helper, or Donofrio, the trackman, and he probably was right down there doing that work and watching how the work was done. In this connection, it is important to note that it is extremely strange that neither Myers nor Donofrio testified that they saw Willis or knew just what he was doing at the time of the accident, or even for several minutes (4 or 5 minutes to 15 minutes) before that (R., pp. 68, 71, 109).

Furthermore, the injuries to Willis, which consisted of amputation of his right leg and right arm (R., p. 169), do not indicate that Willis was in the "six foot", watching, but rather support the view that he was right down there on the track helping to do the work, or down there closely watching and directing it.

There is no claim that it was the custom to have one man who would do nothing but watch.

Furthermore, if there was such a custom or practice, the man who would be selected to do that would be Myers, the helper, or Donofrio, the laborer, undoubtedly the least paid man of the three.

The jury had a right not only to disregard this particular testimony, but to believe that it was entirely fabricated so as to give an excuse or explanation why Willis was supposed to do the watching on this particular day, whereas we know that the last time they did work of this kind Willis and Donofrio were doing the work and Myers was watching.

This alleged conversation indicates by its very language that ordinarily Willis would not be doing the watching, but would be doing the actual work which he was best qualified to do, but the claim is made that he said that he was not feeling "so hot", and Donofrio and Myers told him to do the watching and they would do the work (R., pp. 90, 135).

Apparently, according to this alleged conversation, the regular, ordinary, normal thing would be for Willis not to do the watching but to assist in doing the actual work, which presumably he knew how to do better than the others.

Then we have the stipulated testimony of Mrs. Willis to the effect that when Willis left his home on the morning of the accident he apparently was entirely well and made no complaint of feeling ill (R., p. 181). It is strange that by 8:45 he was telling these men that he was not feeling "so hot" and they volunteered that they would do the work and he should do the watching.

The alleged conversation is too apt. It is very suspicious.

We have shown that the evidence suggests excellent reasons why the jury should not believe that, and that the alleged conversation with Willis was fabricated for the purpose of giving verisimilitude to the defendant's contention that the highest-paid man on the job was doing the common, ordinary, laborer's work of watching.

In any event, this contention that Willis was doing the watching bore only upon the issue of contributory negligence, upon which the defendant had the burden of proof.

Certainly no jurist can say, as matter of law, that the jury was obliged to believe it. As sensible men they had every right to disbelieve it. Courts and juries ordinarily listen with reluctant and disbelieving ears to alleged oral conversations with a man who is killed.

It seems much more likely that on this occasion, too, Myers was doing the watching, particularly in view of the fact that he alone of the three men obviously saw the car in sufficient time to remove himself to a place of safety and thus avoid injury or death.

As bearing upon this fact we may consider the very great interest that both Donofrio and Myers have in placing the blame on Willis, who is not here to deny the accusation,—Myers because he wishes to protect himself in his job, and Donofrio because he wishes to preserve the status of his perfect liability, large claim against the defendant railroad company.

As heretofore shown, the jury could have well found that the defendant's contention in that regard was false and fabricated, and that Willis was not doing the watching, but was engrossed in his work, and that neither he nor Donofrio saw or heard the car in this busy yard, and that Myers, who was probably doing whatever watching was being done, was in the clear, off the track, and did not get hurt,—notwithstanding what he says, because he also swears to this alleged conversation with Willis, which in all probability never took place, and it may be said in passing that he swears to this conversation in almost the same language as Donofrio.

In this connection, it is well to remember that there is no evidence in this case that Willis had *ever* acted as watchman on any other occasion.

A. Plaintiff's testator's death was caused by the gross negligence of the defendant in causing and permitting a dangerous and unsafe practice to exist in its yards.

A great number of cases in both the federal and state courts hold that the master, particularly where the work is complicated, owes a duty to his servants to promulgate proper rules, and exercise reasonable care to see that they are enforced, and that if the work is hazardous he must exercise reasonable care to see that it is conducted in a proper manner. (*The P. P. Miller*, 180 Fed. 288; *Mahoney* v. *Cayuga Lake Cement Co.*, 208 N. Y. 164; *Gagnon* v. *Klauder-Weldon Dyeing Machine Co.*, 174 Fed. 477; *Galley* v. *Smith*, 272 Fed. 999; *McClintic-Marshall Const. Co.* v. *Forgy*, 246 Fed. 193; *Knickerbocker* v. *General Ry. Signal Co.*, 209 N. Y. 404; *Potlatch Lumber Co.* v. *Anderson*, 199 Fed. 742; *Ryan* v. *D. & H. Co.*, 114 A. D. 268 (affd. 188 N. Y. 559); *McCoy* v. *N. Y. C. & H. R. R. R. Co.*, 185 N. Y. 276; *Doing* v. *N. Y. O. & W. R. Co.*, 151 N. Y. 579; *Dowd* v. *N. Y. O. & W. Ry. Co.*, 170 N. Y. 459; *Dzkowski* v. *Reynoldsville Carting Co.*, 216 N. Y. 173.)

And the cases hold that it is not necessary to produce a witness to testify that the defendant's method of doing the work is a dangerous or reckless method (*Banchetti* v. *Gorsline & Swan Construction Co.*, 152 App. Div. 275; *Nowak* v. *Delaney Forge & Iron Co.*, 159 App. Div. 155).

The plaintiff submits that under all the circumstances of this case the jury properly found that the plaintiff's testator's death was due solely to the negligence of the defendant railroad company in conducting its work in an unsafe and unnecessarily dangerous manner.

B. The defense of assumption of risk is not available to the defendant in this case under the amendment to the Federal Employers' Liability Act, which provides that an employee shall not be held to assume any risk arising in whole or in part from the negligence of his employer.

Willis was killed on August 25, 1939, fourteen days after Section 4 (45 U. S. C. A., Sec. 54) of the Federal Employers' Liability Act was amended so as to provide that an employee "shall not be held to have assumed the risks of his employment in any case *where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier;*" (Italics ours).

This constitutes a complete change in the law with reference to assumption of risk in cases under the Federal Employers' Liability Act, and we state that it is indisputable that under this amendment Willis cannot be held to have assumed any risk which arose from the master's permitting and directing the work to be done by an unsafe and dangerous method.

Prior to this amendment, where the plaintiff could prove only that the defendant then and for a long time had conducted its work by an unsafe and dangerous method, the plaintiff did not succeed in the case—not because the defendant did not violate its duty toward its employees in failing to have the work done by a reasonably safe method, but because the plaintiff was so well aware of the unsafe method and the additional risks caused by the unsafe method, that he could be and was held to have assumed the risk which injured or killed him, even when such risk arose entirely out of the employer's negligence in having the work done by an unsafe and dangerous method. That is probably the reason that we do not find in the reports many cases where a plaintiff was held entitled to recover where the defendant did its work by unsafe and unnecessarily dangerous methods, because, while the plaintiff would

be establishing the defendant's causal negligence, he would also be proving the defense of assumption of risk as it then existed.

But the law in effect when Willis was killed provides that the employee shall not be held to have assumed any risk arising *in whole or in part* from the negligence of his employer.

In the case at bar the very risks and hazards which killed Willis, and injured Donofrio, did arise out of the negligence of the defendant, and the Congressional Act now provides that the employee cannot be held to have assumed such a risk.

This distinction was pointed out in the memorandum opinion of Judge Galston upon the first trial of this action:

> "Whether that was unreasonably, unnecessarily and excessively dangerous and unsafe practice was left to the jury, however, to determine as a fact, particularly in view of the amendment to Title 45, U. S. C., Sec. 54. In other words, it was for the jury to determine whether the long practice established over a period of thirty years did in fact constitute negligence on the part of the employer. If so, then there was no assumption of risk by the employee of such negligent custom of the employer. Delaware, Lackawanna & Western R. R. v. Koske, 279 U. S. 7, cited by the defendant, was decided before the amendment to the Federal Employers Liability Act" (R., p. 261).

C. Upon all the evidence in this case the Trial Court could not have properly directed a verdict for defendant.

This case has been submitted to two juries.

It seems to us to be obvious that upon all the evidence in this case no verdict could properly have been directed for the defendant.

A verdict may be directed only when (1) there is a complete absence of pleading or proof on an issue or issues material to the cause of action or defense, or (2) there are

no controverted issues of fact upon which reasonable men could differ.

When the evidence is conflicting, or there is insufficient evidence to make only a "one way" verdict reasonably possible, a directed verdict is improper. It must be further borne in mind that in ruling on the motion the Court must view the evidence in the light most favorable to the party against whom the motion is directed.

The rule is set forth by this Court in *Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580, at page 587, wherein the Court said:

> "In the Doster Case, it was said that where a cause fairly depends upon the weight or effect of the testimony, it is one for the consideration and determination of the jury under proper instructions as to the principles of law involved. These rules being applied in the present case, we are clear that the court would have erred if it had taken the case from the jury and directed a verdict for the company. The evidence in this case was by no means all one way. There was fair ground for difference of opinion, and the court's refusal to instruct the jury, *as matter of law*, that the evidence established the defense of contributory negligence, was right."

This rule has been consistently followed in all the opinions of the Circuit and District Courts. (*Equitable Life Assurance Society of the U. S.* v. *First National Bank of Union Springs*, 40 F. (2d) 817 (C. C. A. 5); *U. S. Fidelity & Guaranty Co.* v. *Wilson*, 52 F. (2d) 66 (C. C. A. 8); *Self* v. *N. Y. Life Ins. Co.*, 56 F. (2d) 364 (C. C. A. 8), certiorari denied, 287 U. S. 607; *White* v. *Bingham*, 25 F. (2d) 837 (C. C. A. 1); *Payne* v. *Haubert*, 277 F. 646 (C. C. A. 6); *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Galvin*, 54 F. (2d) 202 (C. C. A. 6).)

Under the above authorities, which have been consistently followed in the courts, it is clear that under the circumstances of the case at bar the motion for a directed verdict should have been denied.

D. Upon all the evidence in the case, this verdict could not be properly held to have been against the weight of the credible evidence.

Without repeating the evidence presented and the arguments advanced heretofore in this brief, we assert that the evidence in this case showed that the defendant was negligent, and that there was no assumption of risk upon the part of the plaintiff's testator.

Of course, it is a fundamental proposition of law that in order for a verdict to be set aside as against the weight of the evidence, it is not enough that the Court might have arrived at a different result had it been trying the questions of fact, but the verdict must be manifestly and palpably against the evidence in the case. (*Weed* v. *Lyons Petroleum Co.*, 294 Fed. 725; *Pringle* v. *Guild*, 119 Fed. 962; *Wilcox* v. *N. Y. N. H. & H. R. Co.*, 81 Fed. 143; *Nonce* v. *Richmond & D. R. Co.*, 33 Fed. 429; *Rosenzweig* v. *Hines*, 285 Fed. 622.)

II

The Trial Court erred in granting, in the alternative, a new trial on the ground, as stated, that plaintiff's verdict was contrary to the evidence.

When the jury's verdict was returned, defendant's counsel made a formal motion to set aside the verdict and for a new trial, and also moved for the direction of a verdict.

The Record shows that there was no argument by the defendant in support of its motion for a new trial, and not a single word concerning the granting of a new trial, or any reason therefor, appears in the opinion of the Trial Court, which covers twenty pages of the printed Record.

Despite the fact that no reasons had been advanced for the granting of a new trial, the Court signed an order, arbitrarily ordering a new trial, in the alternative, on the ground that the verdict, as rendered, was "contrary to the evidence" (R., p. 259).

This ruling is not only illogical but inconsistent with the opinion of the Court.

The Court, in its opinion, decided that the "verdict cannot stand, because it is contrary to the only evidence in the case; that evidence requires that a verdict be directed for the defendant, and it is so ordered" (R., p. 257). That, obviously, means that, in the Court's opinion, there was no evidence upon which a verdict might have been found in plaintiff's favor, and constitutes not a basis for a new trial but a basis for the direction of a verdict.

It must be remembered that the Court gave the same reason and used the same language in ordering a new trial.

When the action of the Court in granting a new trial is dictated by a consideration of the fact merits no legal injustice is done; when, however, it is dictated wholly by the judgment of the Court upon the law of the case, the harm done the party in whose favor the verdict is rendered may be irreparable, and this action should not be permitted to stand.

The Trial Court has thus deprived the plaintiff of a verdict on the ground that there was no evidence to support the verdict, and, at the same time, has attempted to deprive the plaintiff of any opportunity to have the verdict reinstated in the event that the Trial Court was wrong in its ruling.

The Trial Court, having found that there was no evidence, in its opinion, to support a plaintiff's verdict, could not have consistently or properly ordered a new trial, but should have denied the motion for a new trial.

We recognize the rule that, ordinarily, an appellate court will not review the action of a Trial Court in granting or denying a motion for a new trial, and that such an order is not, ordinarily, an appealable order.

But the law is now well settled that on an appeal from a final judgment, subsequently entered, the order is appealable, and the ruling may be assigned as error, on the ground that the Court abused its discretion (*Marshall's U. S. Auto*

Supply, Inc. v. *Cashman*, 111 Fed. (2d) 140, certiorari denied, Supreme Court, 85 L. Ed. 66; *Pettingill* v. *Fuller*, 107 Fed. (2d) 933, certiorari denied, 309 U. S. 669).

Indeed, in the case at bar there was more than an abuse of discretion. There was an arbitrary ruling by the Trial Court without any basis or justification.

We, of course, do not know, but it may be that the District Judge belatedly thought that, in any event, he could prevent the reinstatement of the verdict if the Circuit Court of Appeals or this Court held that he was in error in directing a verdict in favor of the defendant, and decided that, if his ruling was reversed, the plaintiff should not be allowed to have the verdict reinstated. We submit that such a ruling is illogical, inconsistent and unjust, and cannot be sustained.

The case at bar presents a stronger situation on the facts than either of the cases referred to above. In those cases, the Circuit Court of Appeals reviewed, after final judgment, an interlocutory order made at a first trial in the action. Here the order was made immediately prior to the final judgment.

Although we realize that another error which, we contend, Judge Byers made would not be a ground for allowing certiorari herein, we think the question may be briefly referred to in the event this Court grants certiorari, or thereafter concludes that the decision of the Circuit Court was erroneous.

As heretofore stated, the first trial was before Judge Galston and the second trial before Judge Byers. The evidence as to liability at both trials consisted entirely of depositions taken by the plaintiff of the defendant's employees, and was the same at both trials, the defendant resting upon plaintiff's case and moving for the direction of a verdict.

Upon the first trial Judge Galston held that the question of whether or not the defendant was negligent in the manner in which it conducted the work was a question of fact

for the jury, and denied the defendant's motion for the direction of a verdict, and we contend that under the well-settled federal case law this decision constituted the law of the case and that Judge Byers was obliged to follow it. The federal courts have consistently held from the earliest times that a previous decision upon the same facts in the same case is the *law of the case* until a different rule is laid down by a higher court, although such decision was rendered by another judge than the one conducting the second trial. (See *Wakelee* v. *Davis*, 44 Fed. 532; *Hadden* v. *Natchaug Silk Co.*, 84 Fed. 80; *Farmers' Loan & Trust Co.* v. *Miller*, 298 Fed. 758; *Commercial Union of America, Inc.* v. *Anglo-South American Bank, Ltd.*, 10 F. (2d) 937; *Block* v. *Mansfeld Mining & Smelting Co.*, 23 F. Supp. 700; *In re Hines*, 88 F. (2d) 423.)

Without continuing the discussion further we think we are justified in saying that the comment of Swan, C. J., in his opinion in the Court below in this case, is no answer at all to the contention we make, and no reason for departing from the well-settled rule as set forth in the decisions we hereinabove cite.

CONCLUSION

For the reasons stated in the petition and in this brief, it is respectfully submitted that the application for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS J. O'NEILL,
Attorney for Petitioner.

THOMAS J. O'NEILL,
JEREMIAH J. RIORDAN,
of Counsel.

Appendix

Section 4 of the *Federal Employers' Liability Act*, 45 U. S. C. A., Section 54, reads as follows:

> "In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

(21)

OCT 30 1941

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

No. 686

B. KATHRYN WILLIS, as EXECUTRIX OF
GEORGE S. WILLIS, DECEASED,
Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

BRIEF FOR DEFENDANT-RESPONDENT IN OPPOSITION TO PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI

RAY ROOD ALLEN,
G. HUNTER MERRITT,
27 William Street,
New York City,
Counsel for Respondent.

FREDERIC D. McKENNEY,
Washington, D. C.,
Counsel for Respondent.

Press Printing Company, Inc., 88 Lafayette Street, New York, N. Y.

CONTENTS

PAGE

Brief for Defendant-Respondent in Opposition to Plaintiff's Petition for Writ of Certiorari..... 1

POINTS

I. The decision below was in no wise based upon the assumption of risk rule, therefore there is no basis for the contention that certiorari should be granted upon the ground that this cause involves the construction of the recent assumption of risk amendment to the Federal Employers' Liability Act..... 2

II. There is no basis for asking this Court to review the decision of the two lower courts that there was no evidence sufficient to make a jury issue as to defendant's negligence... 3

III. No error was committed in the Trial Court granting, in the alternative, a new trial.... 6

CONCLUSION. The petition for a writ of certiorari should be denied..... 7

AUTHORITIES

	PAGE
Banchetti v. Gorsline & Swan Const. Co., 152 App. Div. 275	3
Boehmer v. P. R. R. Co., 252 U. S. 496	6
Craft v. Northern Pacific R. Co., 62 Fed. 735	4
Crowell v. Benson, 285 U. S. 22, 65	6
C. & R. Ry. Co. v. Martin, 283 U. S. 209, 216	4
General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175, 178	6
Hauss v. Lake Erie etc. Co., 105 Fed. 733, 736	4
Houston Oil Company v. Goodrich, 245 U. S. 440, 441	6
Montgomery, Ward & Co. v. Duncan, 311 U. S. 243	6
Nowak v. Delaney Forge & Iron Co., 159 App. Div. 155	3
P. R. R. Co. v. Chamberlain, 288 U. S. 333, 343	4
Robinson v. New York Central, etc. Co., 9 Fed. 877	4
United States v. Johnston, 268 U. S. 220, 227	6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

No. 686

B. KATHRYN WILLIS, as Executrix of GEORGE S. WILLIS, deceased,
Petitioner,

AGAINST

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

BRIEF FOR DEFENDANT-RESPONDENT IN OPPOSITION TO PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI

The Circuit Court of Appeals decision is now reported at 122 F. (2d) 248.

The fact situation out of which this cause arose is succinctly stated by the Circuit Court of Appeals as follows:

"The story of the accident as told by the plaintiff's witnesses is briefly as follows: Willis and his fellow workers, Donofrio and Myers, were at work repairing switch 14 on the westerly side of the Enola classification yard. There was a long standing custom, with which all the employees were familiar, for switching to be continued while track repair work was being performed, and for the repair gang to protect themselves by having one of their number act as lookout and give warning of approaching cars. As cars are cut off at the Hump they roll down by gravity, attaining a speed of from six to ten miles per hour, and are directed to the proper track by the operation of switches manipulated from the Hump office. The car which hit Willis had to pass switch 14 to get on track 15, for which

it was destined. The switch was so set that cars could be sent to tracks 15, 16 and 17 but not to track 14. At the time of the accident Donofrio and Myers were at work on the switch and Willis was standing watch, as had previously been arranged between the three. No warning was given by Willis of the approach of the car which hit him. Myers happened to catch a glimpse of it over his shoulder when it was five or ten feet distant and jumped out of the way. The other two were hit, with the result that Willis was killed and Donofrio seriously injured'' (R. pp. 274-5).

POINTS

I. The decision below was in no wise based upon the assumption of risk rule, therefore there is no basis for the contention that certiorari should be granted upon the ground that this cause involves the construction of the recent assumption of risk amendment to the Federal Employers' Liability Act.

The decision of the Circuit Court of Appeals and the ruling of Judge Byers in the Trial Court were both upon the ground that the plaintiff had failed to establish negligence on the part of the defendant, not upon the ground that although there was negligence of the defendant, Willis had assumed the risk. Judge Frank's dissenting opinion shows that he also did not consider that the question of assumption of risk was involved. There was no suggestion in either court that plaintiff should be denied recovery on the ground that Willis had assumed the risk of negligence on defendant's part. Indeed, as defendant's brief in the Circuit Court of Appeals shows, defendant made no such contention.

There is, therefore, no basis for seeking certiorari upon the ground that this cause involves construction of the assumption of risk amendment.

II. There is no basis for asking this Court to review the decision of the two lower courts that there was no evidence sufficient to make a jury issue as to defendant's negligence.

Plaintiff's claim of negligence is that defendant should not have permitted work to go forward on switch 14, without blocking the track leading to that switch (Petition, 2; Brief, 15). It is not clear whether or not plaintiff claims that this method was negligent even though proper provision for warning was made. Plaintiff's argument, in any event, is directed principally to the contention that no provision for warning was made.

There was no testimony that failure to block the track alone (*i. e.*, apart from the question of warning), made the work unnecessarily dangerous, and both the Circuit Court of Appeals and Judge Byers ruled that this method of work was not negligent where provision was made for warning (R. 276; 256).

Neither *Banchetti* v. *Gorsline & Swan Const. Co.*, 152 App. Div. 275, nor *Nowak* v. *Delaney Forge & Iron Co.*, 159 App. Div. 155, supports plaintiff's contention that the jury could find the method of doing the work dangerous and reckless, even without any testimony to that effect (Brief, 21). In the *Banchetti* case, men standing on a narrow scaffolding high in the air, were struck when a draft was moved without warning by a derrick they could not see, and in the *Nowak* case, the winch operator could not see his fellow workmen nor they him and there was no lookout. Willis was in an open yard with ample view and nothing else to do but watch in one direction, in the daytime.

On the question of lookout, the testimony of the two witnesses to the accident was uncontradicted that Willis was acting as lookout, and both courts so found (R. 275; 256).

Judge Frank, however, thought that notwithstanding that the jury never saw the witnesses, their testimony having been taken by deposition, the jury were "entitled to reject this uncontradicted evidence" (R. 277), because the witnesses were defendant's employees and might have an interest in clearing their employer or themselves of blame (R. 278). This remarkable conclusion was not rested on any supporting decision.

Although Judge Frank said he was "not aware of any decisions to the contrary" (R. 279), *Hauss* v. *Lake Erie etc. Co.*, 105 Fed. 733, 736, held that the fact that a witness was an employee was not enough to justify rejection of his testimony. Of the other cases cited by Judge Frank as furnishing "some support" for his view, *Craft* v. *Northern Pacific R. Co.*, 62 Fed. 735, went on the ground of the witness's demeanor and other impeaching circumstances, and an Oregon code provision giving the jury unusual latitude in rejecting testimony; and in *Robinson* v. *New York Central, etc. Co.*, 9 Fed. 877, although the witnesses testified that the boiler was sound, the Court considered that the test as detailed by them was not adequate to establish whether the boiler was sound. The consequences of a rule of law such as Judge Frank suggests would be in effect to brand all employee witnesses as perjurers, as a matter of law.

Decisions of this Court to the contrary are *C. & R. Ry. Co.* v. *Martin*, 283 U. S. 209, 216, and *P. R. R. Co.* v. *Chamberlain*, 288 U. S. 333, 343.

Plaintiff's brief makes little attempt to justify the view expressed by Judge Frank but rather attempts to show that there were contradictions in the testimony,—contrary to the view of all of the Judges, both Trial and Appellate.

The alleged contradictions disappear upon analysis. As to Myers, it is clear that his statement that no one had been appointed to watch, referred to no one outside the gang. He had just testified to plaintiff's counsel that no one outside the gang acted as watchman, but that, of the gang, Willis was acting as watchman (R. 114). In testifying that the men did not talk "about how the work was to be done with respect to watching", Myers was referring to the method of watching. As to Willis's appointment to watch, he testified:

"George [Willis] said he was not feeling so good. Tommy and I both said, 'Well, George, you watch. Tommy and I will do the work.' That is just the words we said" (R. 135).

Since the witnesses testified that sometimes one stood watch and sometimes another, no contradiction was involved in Donofrio's testimony (Brief, 18) that on a switch job two days previous Myers watched and Willis worked (R. 81).

The fact that Willis was a signal maintainer and may have been more highly paid than the other men (Brief, 18), is in no wise contradictory of testimony that he sometimes acted as a watchman and that, not feeling well, the gang had arranged that he do so on the day of the accident.

The fact that Myers and Donofrio did not know just what Willis was doing at the moment of the accident or for a few minutes before, is not contradictory of the testimony

that Willis was acting as watchman, but rather is confirmatory of the fact that Myers and Donofrio were giving their whole attention to the switch in reliance upon Willis' acting as lookout to protect them.

The fact that Willis was in a place where he could be struck shows not that he had not undertaken the job of watching but that he was negligent in performing his duty to watch.

This is an appropriate case for this Court to apply the rule laid down in *Boehmer* v. *P. R. R. Co.*, 252 U. S. 496:

"* * * we accept the concurrent judgment of the lower courts that the carrier was not negligent."

"* * * where two courts have agreed [directed verdict for the defendant], we will not enter upon a minute analysis of the evidence. *Chicago Junction Ry. Co.* v. *King*, 222 U. S. 222."

Certiorari is not granted "to review evidence and discuss specific facts". *United States* v. *Johnston*, 268 U. S. 220, 227; *Crowell* v. *Benson*, 285 U. S. 22, 65; *Houston Oil Company* v. *Goodrich*, 245 U. S. 440, 441; *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178.

III. No error was committed in the Trial Court granting, in the alternative, a new trial.

It was not only proper, but the duty of the Court, to pass upon the alternative motion. *Montgomery, Ward & Co.* v. *Duncan*, 311 U. S. 243. In so far as plaintiff argues that this procedure is "illogical" and that there is inconsistency between the two forms of relief granted, plaintiff is in effect asking for a reconsideration of the *Montgomery, Ward & Co.* decision.

The propriety of the first branch of the relief granted (dismissal of the complaint) is dealt with in the preceding point.

The propriety of the alternative relief (new trial) in no way turns on what argument, if any, upon that motion is made a part of the Record (Brief, 25). In any event, the granting of a new trial is not a proper matter for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

This case presents none of the recognized grounds for the granting of a writ. No question of construction of a statute is involved, nor is the decision at variance with decisions of this Court or the courts in other circuits. No question of law or of public importance is involved. What is sought is merely that this Court review the evidence for the purpose of deciding whether the two courts who found it insufficient after painstaking analysis, were incorrect.

RAY ROOD ALLEN
G. HUNTER MERRITT
FREDERIC D. MCKENNEY
Counsel for Respondent.

New York, N. Y., October 28, 1941.